Supreme Court, U.S.
FILED
SEP 27 1994
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No. 93-1915

In The

Supreme Court of the United States

October Term, 1994

FLOYD THOMAS ALTIMUS
and
JANICE M. CHURCH,

Petitioners,

v.

STATE OF OREGON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Oregon

REPLY BRIEF

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September, 1994

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REPLY BRIEF

The State of Oregon begins its response in No. 93-1915 with the concession that it would be appropriate "in the alternative" to grant the petition, vacate, and remand for further consideration in light of the Court's intervening decision in *Dolan v. City of Tigard*, 114 S Ct 2309 (1994). Response at 1. Thereafter, the state avoids directly addressing the issues presented in the petition, and instead raises a series of collateral arguments. A few of the state's assertions merit some reply.

Respondent does not challenge the record presented in the petition; however, in the first half of its brief, the

state undertakes a subtle redefinition of the evidentiary rulings which are at issue. After a long and selective characterization of some of the *other* evidence presented at trial, the state indicates that "[f]inally" its expert "*took into account* the *possibility* that * * * the city *might* require dedication of a 60-70 foot strip of land." Response at 3 (emphasis added). Defendants, on the other hand, "wanted the jury to be insulated from *any* evidence that- * * * the landowner *might* be required to dedicate *a portion* of the land." *Id.* at 6 (emphasis added).

In fact, petitioners' constitutional objections were directed at the specific evidence received, which involved the state's assertion, through expert testimony and demonstrative exhibits, that petitioners *would* have been required to dedicate 70 feet of land to the same project for which their property was being condemned. Petition at 4-6; App 32-33. This requirement, which exceeded any potential local exaction in the absence of the project, was presented as a certainty, not a possibility. *Id.* The issue presented in the petition is not whether *any* evidence of a local dedication requirement may be relevant in a condemnation action, but rather whether such evidence is subject to *any* constitutional restraint.

The state's primary response, analyzing this Court's decision in *Dolan*, seems to be that its evidence should be exempt from constitutional scrutiny based on the context in which it arises. The state explains that because a particular development on the property cannot be precisely defined, there is no basis on which to challenge the evidentiary use of a hypothetical exaction – even one that admittedly exceeds *any* which the locality might have

applied in the absence of the state's project.[1] According to the state's analysis, the standard of rough proportionality, which *Dolan* establishes, disappears when the requirement is imposed "hypothetically" by a condemnor.

A similar irony is inherent in the state's related suggestion that "it makes no legal sense" to apply *Dolan* "where a takings claim is not even ripe because the dedication requirement is as yet hypothetical only." Response at 9. As defendants in a state-initiated action in eminent domain, petitioners had no prior opportunity to challenge the "hypothetical" exaction at issue here. And if the state can dispose of their challenge now, it can rest secure in the knowledge that the kind of takings claim it describes will never ripen. For the citizen whose property is being taken, the unregulated use of such evidence has an impact that is far from hypothetical. If the Constitution's guarantee of just compensation is to have meaning for petitioners and others like them, the use of such evidence must not be immune to scrutiny.

As a "second and independent reason" that the petition should be denied, the state suggests that the evidence received may not have affected the jury's verdict. Response at 10. Interpreting that verdict for this Court, the state asserts:

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[1] Petition at 5-6 (I Tr. 125-130, 131-32). For this reason, in petitioners' view, the exactions proposed in this case failed to satisfy "even the most untailored standards," and were subject to reversal even if this Court had affirmed in *Dolan*. *See Nollan v. California Coastal Comm'n*, 483 US 825, 838 (1987).

> " * * * The *only* logical explanation for the jury's award is that the jury accepted the state expert's value of $3,500 per acre for light industrial use, applied that figure to all of the property (including the portion that might be subject to dedication), and rounded the amount of property to an even two acres, thus awarding $7,000 in total." Response at 10, n 12. (emphasis added).

Of course this is just the opposite of what the state told the Oregon Court of Appeals:

> "In reaching its verdict of $7,000, which is consistent with the evaluation of the state's expert, the jury *necessarily* found that the city's dedication requirement was *not* state dominated. That is, *the jury obviously considered the city's dedication requirement in arriving at its verdict.* * * * " Respondent's Brief, No. A66578, at 12 (emphasis added).

Having conceded this point below, the state should not be permitted to take a contrary position now.

The constitutional issues presented here should be too important to be dismissed by such self-serving "explanations" of what the jury was thinking. The state's inability to face these issues directly demonstrates the appropriateness of review. Indeed, while the state argues the need for a "fact-bound, case specific examination of

the particular trial record," the salient facts are quite straightforward and support a summary reversal.

The petition should be granted.

Respectfully submitted,

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